LOH ENG LEONG & ORS

v.

LO MU SEN & SONS SDN BHD & ANOR

HIGH COURT MALAYA, TAIPING
ZULKEFLI AHMAD MAKINUDIN J
[ORIGINATING SUMMONS NO: 21-51-1998(T)]
6 NOVEMBER 1998

COMPANY LAW: *Shares - Transfer of shares - Whether valid - Whether transfer of notice required - Company's M&A, art. 21(b) - Interpretation - Whether ambiguous - Whether capable of two meanings - Whether less restrictive meaning should be given*

COMPANY LAW: *Directors - Discretionary power - Company's M&A, art 21(h) - Right of refusal to register transfer of shares - Whether exercised*

CONTRACT: *Shares, transfer of - Whether a valid contract*

CIVIL PROCEDURE: *Action - Application for rectification of the register of members of company - Delay of fifteen months after plaintiffs acquiesced to transfer of shares - Whether plaintiffs guilty of delay*

The 1st defendant ('the company'), a family business, was a private limited company held in shares by one Loh Mu Sen, the father, and his sons. The 2nd defendant and the plaintiffs were amongst the siblings. In this instance, pursuant to s. 161 of the Companies Act 1965 ('the Act'), the plaintiffs applied to rectify the Register of Members of the company by striking out the name of the 2nd defendant as the holder of 161 shares that had been transferred to the 2nd defendant by one other sibling. The said 161 shares ('the disputed shares') were purchased by the 2nd defendant from the said sibling on a willing seller and a willing buyer basis.

The plaintiffs contended that the transfer of the disputed shares was invalid as it did not comply with the requirement of a transfer notice under art. 21(b) of the memorandum and articles of association ('M&A') of the company.

Held:

[1] Article 21 of the M&A of the company does not impose any prohibition or restriction on the transfer of shares from members to members. A member of the company when transferring any shares to another member is not required to give a transfer notice to the company.

[2] By virtue of art. 21(a) of the M&A, shares may be transferred by a member transferor to any other member selected by the transferor. Similarly, shares may be transferred by other persons entitled to transfer to any member selected by the transferor. Also, no shares shall be transferred to a person who is not a member. The said article empowers the directors to admit any person as a member whom they deem desirable in the interests of the company to admit to membership. The words "admit to membership" in the said article indicate that the directors are empowered to allow non-members to become members provided they are willing to purchase the shares at fair value.

[2a] However, art. 21(b) of the M&A is ambiguous. Whereas art. 21(a) spells out the entity capable of transferring the shares as being "a member" or "other person entitled to transfer", art. 21(b) does not mention that said entity. Instead art. 21(b) spells out the entity that is required to give a transfer notice when transferring shares to a member as being "the person proposing to transfer". There is no mention of a member or other persons entitled to transfer shares to a member being required to give a transfer notice. Since the restrictions imposed by art. 21 on the right to transfer shares appear ambiguous, the court should interpret such interpretation strictly, and when such a restriction is capable of two meanings, the less restrictive meaning should be adopted. Therefore, the correct interpretation of art. 21 would be that there was no requirement of a transfer notice when a member or other persons entitled to transfer wished to transfer his shares to another member.

[3] Article 21(h) of the M&A gives the directors an absolute and uncontrolled discretion to refuse to register any proposed transfer of shares. That being the case, the resolution passed by the Board of Directors on 6 November 1996 was a clear indication that the Board of Directors had approved the transfer of the disputed shares to the 2nd defendant as a member from another member. Also, the transfer of the disputed shares was in accordance with the law and practice of the company and within the scope of art. 21. Further, to allow the plaintiffs now to seek a retransfer by offering to all members of the company to purchase the disputed shares would be inconsistent with s. 105 of the Act.

[4] There was a valid contract between a willing seller and a willing buyer in the transfer of the disputed shares to the 2nd defendant. The court must respect the intention of the two parties who had entered into a contract wherein there was an offer and acceptance with consideration. It was therefore not open to the plaintiffs now to seek the assistance of this court to allow them to be a party to the said contract.

[5] The plaintiffs were guilty of delay and laches in making their application for rectification of the register under s. 162 of the Act at this stage. Section 162 of the Act is discretionary in nature and therefore the court needs to look into the facts of the case before it can exercise its discretion. This discretion can only be exercised if it is satisfied of the justice of the case. In this case, there was a delay of about 15 months after the plaintiffs accepted and acquiesced to the transfer of the disputed shares from one member to another member.

Obiter:

[1] At common law, the rights of an owner to transfer property is unfettered. Shares in a company are property. Shares should be presumed to be freely transferable unless the company's memorandum or articles of association provides to the contrary. Further, in the absence of restrictions in the company's constitution, a shareholder has by virtue of s. 98 of the Act, the *prima facie* right to transfer his shares without the consent of anybody to any transferee and his motive in disposing his shares is immaterial.

[2] Section 15(1) of the Act provides that a company having a share capital may be incorporated as a private company if its memorandum or articles restricts the right to transfer its shares. However, the Act does not require any particular form of restriction or prescribe the extent or scope of the restriction required and as such the restrictions imposed may vary in form and severity in accordance with the framers of the company's constitution.

[3] The effect of a restriction is solely a matter of construction of the articles of association of the company. However, as a shareholder is *prima facie* entitled to transfer his shares, any restriction imposed on that right in the articles must be unambiguous as the court will interpret restrictions on transferability strictly. If there is an ambiguity or uncertainty, the court will give the shareholder the greatest freedom to transfer.

[4] Section 105(1) of the Act provides that where a company refuses to register a transfer of shares, it shall within one month after the date on which the transfer was lodged with it, send to the transferor and to the transferee notice of the refusal. Default by the directors in refusing to exercise their discretion within the stipulated time will result in the company losing its rights to refuse to register a transfer.

[5] At common law, the powers conferred by the articles on the directors must be exercised within a reasonable time failing which the right of refusal shall be forfeited. A reasonable time within which directors must make

up their mind either to accept or to refuse a transfer must be within two months within which they have to answer under s. 78(1) of the UK Companies Act 1948.

[Application dismissed.]

Cases referred to:
Bellerby v. Rosland & Marwoods Steamship Company Ltd [1901] 2 Ch Div 265 ***(refd)***
Delavenne v. Broadhurst [1931] 1 Ch 234 ***(refd)***
Greenhalgh v. Mallard & Ors [1943] 2 All ER 234 ***(refd)***
Re Asian Organisation Ltd [1961] MLJ 295 ***(refd)***
Re Len Chee Omnibus Co Ltd [1969] 2 MLJ 202 ***(refd)***
Re National Provincial Marine Insurance Co [1870] 5 Ch 559 ***(refd)***
Re Swaledale Cleaners Ltd [1968] 1 WLR 1710 ***(refd)***
Royal Trust Nominees Ltd v. Sri Hartamas Development Sdn Bhd [1989] 2 CLJ 1069 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 15(i)(a), 21, 98, 105, (1), (2), 162, 355

Companies Act 1948 [UK], s. 78(1)

For the plaintiffs - James Ng; M/s Shearn Delamore & Co
For the defendants - Kalearasu (Yong Nyet Kim with him); M/s Kim & Assoc

JUDGMENT

Zulkefli Ahmad Makinudin J:

The Plaintiffs' And The Defendants' Action

This is the plaintiffs' application pursuant to s. 162 of the Companies Act 1965 ('the Act') as in encl. 3 of this originating summons seeking the following orders:

(1) that the register of members of the first defendant company ('the said company') be rectified by striking out the name of the second defendant as the holder of 161 shares in the said company numbered under the share certificates 0050 to 0053 both inclusive, and

(2) that the said company offers to all members of the company the purchase of the 161 shares in accordance with art. 21 of the article and memorandum of association of the said company.

(3) that the cost of the application be borne by the defendants.

(4) such other and further reliefs that this honourable court deems fit and proper.

The defendants by way of summons in chambers as in encl. 19 applied for the following orders:

(1) that the plaintiffs application under the aforesaid originating summons be dismissed with costs.

(2) that in the alternative the court invokes its power under s. 355 of the Act to validate the purchase and transfer of the disputed shares by and to the second defendant.

(3) that the cost of the application be borne by the plaintiff.

As the plaintiff's action and the defendant's action relate to the same subject matter both the plaintiff's application in encl. 3 and the defendant's application in encl. 19 were heard together.

The Facts Of The Case

The relevant facts of the case are as follows:

The first defendant is a private limited company incorporated in Malaysia under the Companies Act 1965 on 8 September 1970. The said company was founded by the father, Lo Mu Sen who is the chairman. The three plaintiffs and second defendant are brothers. Prior to the setting up of the said company the father had been operating as a sole proprietor in pawnshops and crockery retailing shops. With the setting up of the said company called Lo Mu Sen & Sons (Sdn) Bhd the father gave shares without any consideration but for love and affection to his siblings. Hereinbelow are listed the name of the shareholders and the number of shares held by the respective family members prior to the transfer of the said shares to the second defendant.

Share Members	No. of Shares	Relationship
(1) Lo Mu Sen	37	Father
(2) Loh Eng Leong	241	1st Son (1st plaintiff)
(3) Loh Eng Wah	241	2nd Son (2nd defendant)
(4) Loh Yoon Hoi	161	3rd Son (2nd plaintiff)
(5) Lo Yoon Nien	161	4th Son (3rd plaintiff)
(6) Lo Yoon On	161	5th Son
(7) Lo Yoon Khong	161	6th Son (transferor)

On 6 November 1996, the second defendant Loh Eng Wah purchased from the sixth son Lo Yoon Khong the whole of 161 shares on a willing buyer willing seller basis. The board of directors of the said company approved by way of resolution the aforesaid sale. Thereafter the transfer was lodged and registered with the registrar of companies. The plaintiffs at all material times accepted and acquiesced to the said transfer of shares from one member to another member. However, only after a lapse of 15 months did the plaintiffs file this application as hereinbefore this court.

The Issue

As I see it this case rests on one legal issue and it relates to the question of whether the transfer of shares to the second defendant is subject to the requirement of a transfer notice under art. 21 of the memorandum and articles of association of the said company (hereinafter referred to as the 'M&A']. It therefore calls for the proper and correct interpretation of the said art. 21 of the M&A. Article 21(a) and (b) of the M&A reads as follows:

> 21. The right of members to transfer their shares shall be restricted as follows:
>
> (a) A share may be transferred by a member or other person entitled to transfer to any member selected by the transferor; but save as aforesaid, and save as provided by sub-clause (f) and (g) hereof, no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the Company to admit to membership, is willing to purchase the same at fair value.
>
> (b) Except where the transfer is made pursuant to sub-clauses (f) and (g) hereof, the person proposing to transfer any share (hereinafter called "the proposing transferor") shall give notice in writing to the Company (hereinafter called "transfer notice") that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale to any member of the Company (or person selected as aforesaid) willing to purchase the same (hereinafter called "the purchasing member") at the price so fixed, or, at the option of the purchasing member, at the fair value to be fixed in accordance with sub-clause (d) hereof. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. A transfer notice shall not be revocable except with the consent of the directors.

It is the contention of the plaintiffs that the transfer of the said shares to the second defendant is invalid and ineffective because it did not comply with the restrictions on transfer as prescribed under art. 21 of the M&A in particular

sub-cl. (b) of the said article which stipulates that the person proposing to transfer any share shall give a notice in writing to the company that he desires to transfer the same.

The defendants on the other hand contend that the said shares were validly and effectively transferred to the second defendant in accordance with art. 21 of the M&A and that there is no requirement for the transfer notice to be given to the company. The defendants in the alternative contend that if the court holds that the said transfer is invalid and ineffective the court can in the circumstances of the case invoke its discretionary power under s. 355 of the Act to validate the said transfer of the disputed shares.

The Findings

At common law the rights of an owner to transfer property is unfettered. Shares in a company are property. The courts from an early date have taken the view that shares should be presumed to be freely transferable unless the company's memorandum or articles of association provides to the contrary (see the case of *Re National Provincial Marine Insurance Co Gilberts' case* [1870] 5 Ch 559). Section 98 of the Companies Act 1965 ('the Act') on the other hand provides as follows:

> The shares or other interests of any member in a company shall be movable property, transferable in the manner provided by the articles, and shall not be of the nature of immovable property.

Therefore in the absence of restrictions in the company's constitution, the shareholder has by virtue of the said s. 98 of the Act the *prima facie* right to transfer his shares without the consent of anybody to any transferee and his motive in disposing his shares is immaterial.

Although shares are transferable at will at common law it has long been established that the company's memorandum or articles of association may impose restrictions on the right to transfer. Section 15(i)(a) of our Companies Act 1965 provides that a company having a share capital may be incorporated as a private company if its memorandum or articles restricts the right to transfer its shares. However, the Act does not require any particular form of restriction or precribe the extent or scope of the restriction required and as such the restrictions imposed could vary in form and severity in accordance with the wishes of the framers of the company's constitution.

I am of the view that the effect of a restriction is solely a matter of construction of the articles of association of the company. However as a shareholder is *prima facie* entitled to transfer his shares, any restriction imposed on that right contained in the articles must be unambiguous as the

court will interpret restrictions on transferability strictly. If there is an ambiguity or uncertainty, the court will be more inclined to the interpretation which will give the shareholder the greatest freedom to transfer. In the case of *Delavenne v. Broadhurst* [1931] 1 Ch 234 on this point it was held that when a restriction is capable of two meanings, the less restrictive meaning will be adopted by the court. Lord Greene MR in the case of *Greenhalgh v. Mallard & Ors* [1943] 2 All ER 234 also had this to say at p. 237:

> Question of constructions of this kind are always difficult, but in the case of the restriction of shares, being personal property is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer which is inherent in property of this kind is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.

Section 105(1) of the Act provides that where a company refuses to register a transfer of shares it shall within one month after the date on which the transfer was lodged with it; send to the transferor and to the transferee notice of the refusal. Section 105(2) of the Act stipulates that if default is made in complying with the said s. 105(1) the company and every officer of the company who is in default shall be guilty of an offence under the Act. It has been held that default by the directors in refusing to exercise their discretion within the stipulated time will result in the company losing its rights to refuse to register a transfer (see the case of *Royal Trust Nominees Ltd v. Sri Hartamas Development Sdn Bhd* [1989] 2 CLJ 1069).

At common law, the powers conferred by the articles on the directors must be exercised within a reasonable time failing which the right of refusal shall be forfeited by the directors. On this point according to Harman LJ in the case of *Re Swaledale Cleaners Ltd* [1968] 1 WLR 1710 a reasonable time within which directors must make up their mind either to accept or to refuse a transfer must be within two months within which they had to make an answer under s. 78(1) of the UK Companies Act 1948.

Having laid out the relevant provisions of the law under our Companies Act 1965 and the principles at common law relating to the transfer of shares and its restrictions I find that art. 21 of the M&A of the said company does not impose any prohibition or restriction on the transfer of shares from members to members. This means that a member of the said company when transferring any share to another member is not required at all to give a transfer notice to the company.

I am of the view that by virtue of the provision of art. 21(a) of the M&A of the said company a share may be transferred by a member transferor to any other member selected by the transferor. I am also of the view that under the same provision a share may be transferred by other person entitled to transfer to any member selected by the transferor. The same art. 21(a) states that no shares shall be transferred to a person who is not a member. It is clear that the said art. 21(a) of the M&A empowers the directors to admit any person to be a member who may be selected by the directors whom they deemed desirable in the interests of the company to admit to membership.

The words "admit to membership" in the said art. 21(a) of the M&A indicates that the directors are empowered to allow non-members to become members provided they are willing to purchase the shares at fair value.

However as regards the provision of art. 21(b) of the M&A of the said company there appears to be ambiguity in the wordings of the provision of the said article. Whereas art. 21(a) of the M&A spells out the entity capable of transferring the shares as being "a member" or "other person entitled to transfer", art. 21(b) of the M&A does not mention that said entity. Instead the said art. 21(b) of the M&A spells out the entity that is required to give a transfer notice when transferring shares to a member as being "the person proposing to transfer". There is no mention of a member or other person entitled to transfer shares to a member being required to give a transfer notice. I am of the view since the restrictions imposed by art. 21 of the M&A on the right to transfer shares appears ambiguous the court should interpret such restriction strictly and that when such a restriction is capable of two meanings, the less restrictive meaning should be adopted. Therefore the correct interpretation of s. 21 of the M&A would be that there is no requirement of a transfer notice when a member or other person entitled to transfer wishes to transfer his shares to another member. It is my view that if it is the intention of the draftsman of the M&A to cut down on the right to transfer shares from member to member, the language used must be sufficiently clear for effect to be given to such an intention and applying the contra proferentum rule in this case the M&A must be construed as not cutting down on the right of transfer from member to member.

I am also of the view that when the board of directors of a company are vested with the discretionary power to accept or to refuse to register transfer of shares, they must exercise that power by passing a resolution at a board meeting. If for some reasons the board of directors does not positively refuse it must be deemed that the power has not been so exercised and the transferee has the right under the Act to have the transfer of the shares registered. It is to be noted that the provision of art. 21(h) of the M&A of the said company

states *inter alia* that it gives the directors an absolute and an uncontrolled discretion to refuse to register any proposed transfer of shares. That being the case it is my view that the resolution passed by the board of directors on 6 November 1996 is a clear indication that the said board of directors had approved the said transfer of shares to the second defendant as a member from another member named Lo Yoon Khong. As regards this resolution passed by the board of directors it is relevant to refer to art. 57 of the M&A which states as follows:

> A resolution in writing signed by all the directors for the time being and pasted in or attached to the minute book shall be effective for all purposes as a resolution of the directors passed at a meeting duly convened and constituted.

It is therefore clear that the transfer of the shares in this case is in accordance with the law and practise of the said company and within the scope of art. 21 of the M&A.

I am further of the view that since the board of directors of the said company had passed a resolution approving the transfer of the said shares it would be incorrect and wrong in law for the plaintiffs now to seek for a retransfer by offering to all members of the company to purchase the said shares. To allow the plaintiffs to do so would be inconsistent with the provision of s. 105 of the Act. It must be noted that the directors of the said company had not refused to register the said transfer of shares to the second defendant. In view of the fact that there was a unanimous decision by the directors to approve the transfer of the said shares to the second defendant it would appear that it was an afterthought by the plaintiffs to come before this court for assistance after a delay of 15 months to retransfer the said shares bearing in mind that the transferor concerned has no intention to transfer the said shares to other members.

As regards the transfer of the said shares in this case to the second defendant it is my view that there is also a valid contract entered into between a willing seller and a willing buyer. In the circumstances the court must respect the intention of the two parties who have entered into a contract which is the fundamental basis of the law of contract wherein there is an offer and acceptance with consideration. It is therefore not open to the plaintiffs now to seek the assistance of this court to allow them to be party to the said contract.

It is also my finding in this case that since the third plaintiff had attended the board of directors meeting when it was unanimously resolved that the said transfer of shares be alloted to the second defendant and now that the third plaintiff gave a conflicting evidence through his affidavit objecting to the said

transfer, the court should give less weight to his evidence. It would be incongruous to allow parties who have acquiesced to the act to be allowed to renege by applying to this honourable court for rectification of the register.

I further find that the plaintiffs have been guilty of delay and laches in making their application for rectification of the register under s.162 of the Act at this stage. The position of s. 162 of the Act is discretionary in nature and therefore the court needs to look into the facts of the case whether it can exercise its discretion. This discretion can only be exercised if it is satisfied of the justice of the case. In the present case there has been a delay of about 15 months after the plaintiffs had accepted and acquiesced to the said transfer of shares from one member to another member before such an application is made. In the case of *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202 the court held that as the application was not made within a reasonable time after the applicant became aware of the facts entitling her to relief the application must therefore be dismissed for laches. In the case of *Re Asian Organisation Ltd* [1961] MLJ 295 the court took the view that it still has the jurisdiction not to rectify the register and may decline to do so if, for instance the applicant has acquiesced in regarding the allottee as a member of the company notwithstanding the invalid allotment. In the case of *Bellerby v. Rosland & Marwoods Steamship Company Ltd* [1901] 2 Ch Div 265 it was held *inter alia* that the justice of the case did not require the rectification of the register after the lapse of more than seven years and when nothing had happened in the meantime. It is my view that since the plaintiffs have failed to stop the second defendant as a member from purchasing the said shares from another member at the resolution adopted by the board of directors of the said company approving the transfer and that there has been considerable delay in making their application for rectification of the register this court cannot give the plaintiffs now "a second bite at the cherry."

Based on the above stated grounds I therefore dismissed the plaintiffs' application in encl. 3 with costs. Since I find that there is no merit in the plaintiffs' application I therefore find that there is no necessity for me to grant the alternative order prayed for by the defendants in their application in encl. 19 for this court to invoke its power under s. 355 of the Act to validate the purchase and transfer of the disputed shares by and to the second defendant.